

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 31205

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	Boise, January 2006 Term
)	
v.)	2006 Opinion No. 15
)	
JEREMY RICHARD HENAGE,)	Filed: February 23, 2006
)	
Defendant-Appellant.)	Stephen Kenyon, Clerk
)	

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, County of Jerome. Hon. John K. Butler, District Judge.

The district court's order denying appellant's motion to suppress is reversed and the conviction is vacated.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.
Sara B. Thomas argued.

Honorable Lawrence G. Wasden, Attorney General, Boise, for respondents. Lori A. Fleming argued.

JONES, J.

While patrolling the streets of Jerome one March evening in 2004, one of that city's police officers (named Johnson) spotted a pickup with a broken taillight and pulled it over. One Zachary Henage was driving; Jeremy, Zach's brother and the appellant here, was a passenger. What started out as a fairly routine traffic stop turned into a contraband-yielding roadside frisk and concluded with a citation being issued to Jeremy for possession of said contraband. Jeremy moved to suppress the evidence, citing his Fourth Amendment guarantee against unreasonable searches and seizures. The district court denied his motion, he appealed, and we reverse.

I.

Mere moments after Officer Johnson pulled over the pickup, a Jerome City sergeant (named Baker) arrived on scene, he also having spotted the pickup and its

broken taillight. Initially, Officer Johnson conversed with Zach and Sgt. Baker acted as cover. At some point during his conversation with Zach, Officer Johnson obtained Zach's driver's license, insurance, and registration information.

Before returning Zach's documentation to him, Officer Johnson conferred with Sgt. Baker, and the two elected to conduct something called a "criminal patrol procedure," which involves an officer-initiated conversation with an individual. The apparent reason for this criminal patrol procedure, explained by Sgt. Baker at the suppression hearing, was that he and Officer Johnson were aware of a recent stop involving Zach where narcotics were found, and because the officers had "heard their names in the narcotics world." Nothing, however, that occurred during the particular stop in this case triggered the decision to conduct the criminal patrol procedure—no suspicious behavior, no tip that the duo was carrying contraband, no observation of any contraband in plain view; in short, no articulable facts that would give either officer a reasonable suspicion that criminal activity was afoot. In fact, the officers had decided to conclude the traffic stop and tell Jeremy and Zach they were free to go.

After the officers decided to conduct the criminal patrol procedure, Officer Johnson chatted with Zach. Sergeant Baker testified that he approached Jeremy and told him he was free to go, that he was not under arrest, but, that he "wanted to talk to them about some things." These "things" concerned narcotics. Jeremy "cooperated," according to Sgt. Baker.¹ At some point during Jeremy's conversation with Sgt. Baker, Jeremy exited the pickup. Whether this was of Jeremy's own volition or upon Sgt. Baker's request is not altogether clear. Jeremy contended he was ordered out of the pickup; Sgt. Baker could not recall, though he did note that he did not like talking through windows.

Once Jeremy was out of the vehicle, Sgt. Baker asked Jeremy if he could look in the pickup. According to Jeremy's account of the event, Sgt. Baker immediately asked Jeremy if he could search the truck and never told him he was free to leave. Both Jeremy and Sgt. Baker do agree that Jeremy declined to consent to the request to look in the truck, since it was his father's truck, not his. Sergeant Baker then asked Jeremy if he had any contraband on his person. According to the officer, Jeremy responded that he had a

¹ Jeremy did not contest the legality of this criminal patrol procedure, so we are obliged not to consider it.

weapon, a knife. According to Jeremy, he told Sgt. Baker, “I have a [L]eatherman in my pocket.”² Sergeant Baker could not recall whether Jeremy initially identified the item as a Leatherman. Jeremy told Sgt. Baker which pocket the object was in, and Sgt. Baker retrieved the object, which turned out to be a Leatherman. Sgt. Baker testified that Jeremy identified the object in question as a Leatherman at the time Sgt. Baker was retrieving it from the pocket where Jeremy told him it was.

After retrieving the Leatherman, Sgt. Baker continued the frisk. He “felt a large hard object in one of his cargo pockets.”³ The item was apparently in a different pocket than the pocket in which the Leatherman was found. Sergeant Baker asked Jeremy what it was, but Jeremy said he did not know. So Sgt. Baker pulled the item—which turned out to be a “glass smoking pipe”—out of the pocket. Along with the pipe, there was another item in the pocket: a hard cigar case. Jeremy denied ownership of the case, instead attributing it to a female person whose name he could not recall. Sergeant Baker still had no plans to arrest Jeremy and told him so. Apparently curious as to the case’s contents, Sgt. Baker opened it and a “white rock” fell out onto the ground. Sergeant Baker asked Jeremy what it was, and Jeremy indicated it was “probably methamphetamine.” (Jeremy’s guess would prove correct.) Jeremy admitted to smoking methamphetamine about 20 minutes prior to his contact with Sgt. Baker. Jeremy was cited, and we gather from the transcripts that after citing Jeremy, Sgt. Baker gave the Leatherman back to him.

Upon Jeremy’s motion to suppress, the district court ruled that the traffic stop had devolved into a consensual encounter. As for the frisk, the court ruled that the frisk was justified from the start, and that Sgt. Baker had every reason to continue to pat Jeremy down after finding the knife since Jeremy was unable to identify what was later discovered to be the pipe and since Sgt. Baker believed the object could have been a weapon.

² A “Leatherman” is a multi-function pocket implement containing various tools and a folding knife. A Leatherman might be more properly characterized as a tool, or possibly a knife, rather than a “weapon”.

³ Jeremy was wearing cargo pants, which are “loose-fitting casual slacks with large patch pockets on the thighs.” NEW OXFORD AMERICAN DICTIONARY 260 (2001).

II.

In reviewing an order granting or denying a motion to suppress evidence, this Court will defer to the trial court's factual findings unless clearly erroneous. *State v. Donato*, 135 Idaho 469, 470, 20 P.3d 5, 6 (2001). However, free review is exercised over a trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *Id.*

III.

Jeremy raises constitutional challenges to three aspects of this particular encounter with the Jerome City Police. He says first that the officers improperly extended the traffic stop beyond the time necessary to effectuate the initial detention, *see Florida v. Royer*, 460 U.S. 498-500 (1983), and second, that Sgt. Baker did not suspect Jeremy of being involved in any criminal activity, which he says is a necessary predicate to a lawful frisk. We need not address these issues today, however, for as we shall see, Jeremy is entitled to relief on his last argument—that the State did not demonstrate, and the district court did not properly find, that Sgt. Baker had objectively reasonable grounds for believing Jeremy was armed and dangerous.

The Fourth Amendment to the United States Constitution, which is of course applicable to the states, provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁴ The exclusionary rule bars admission of evidence obtained in a search that violates this sacred guarantee. *Weeks v. United States*, 232 U.S. 383, 394-98 (1914). A frisk is unquestionably a search within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 28 (1968). Frisks are not generally for discovering non-weapon contraband; the sole purpose of a frisk is to protect the officer and others nearby. *Id.* at 29. The frisk in this case was conducted without a warrant; thus the burden is squarely on the State to justify it. *State v. Weaver*, 127 Idaho 288, 290, 900 P.2d 196, 198 (1995).

To try to meet its burden the State argues that the frisk was justified under *Terry*'s “armed and presently dangerous” exception to the warrant requirement. *See Terry*, 392 U.S. at 27. This exception owes its genesis to Detective McFadden's famous pat-down

⁴ Our state constitution provides the same protection. Idaho Const. art. I, § 17. Jeremy has not argued whether it provides more protection than its federal counterpart, so we will not address the issue here.

of Mr. Terry. Detective McFadden observed Mr. Terry and his cohort appearing to be “casing” a store in downtown Cleveland. *Terry*, 392 U.S. at 5. After deciding that “the situation was ripe for direct action,” Detective McFadden approached the pair, identified himself as a police officer, and asked for their names. *Id.* at 6-7. They “mumbled something” and Detective McFadden grabbed Mr. Terry and patted him down and found a pistol. *Id.* at 7. The U.S. Supreme Court said the pat-down was lawful. *Id.* at 8. It expressed the need to balance the people’s interest in crime prevention and detection and the person’s guarantee under the Fourth Amendment. *Id.* at 20-26. As explained by Chief Justice Warren, the balance struck can be distilled to this:

there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not only to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27 (citations omitted). So, we learn from Mr. Terry’s run-in with the Cleveland Police that to justify a frisk, the State must, at a minimum,⁵ demonstrate specific, objectively reasonable and articulable facts that yield a reasonable inference that the friskee is armed *and* presently dangerous.

In this case we focus on the inception of the frisk. According to *Terry*, our first inquiry is “whether the officer’s action was justified at its inception.” *Id.* at 20. The Court held that where a police officer reasonably concludes, based on his observations and experience, “that the persons with whom he is dealing may be armed and presently dangerous . . . and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such

⁵ As we noted, we need not address the argument that to justify a frisk, the officer must have both a reasonable suspicion of criminal activity *and* an objective belief that the individual is armed and dangerous. Our inquiry in this case is *solely* on the question whether the State has demonstrated a reasonable belief that Jeremy was armed and presently dangerous.

persons in an attempt to discover weapons which might be used to assault him.” *Id.* at 30.

The record in this case does not disclose that Sgt. Baker pointed to specific and articulable facts that would reasonably warrant a frisk for weapons. At the suppression hearing, Sgt. Baker testified to two reasons why he frisked Jeremy: he was acting nervous and he had admitted having a knife. This, during what the State argues was a consensual encounter (a matter on which we express no opinion) in which Jeremy was not in any way acting threatening or dangerous, but indeed, according to Sgt. Baker’s testimony, was “cooperative” and “polite.” Sergeant Baker characterized their conversation as “friendly” and “congenial.” He knew Jeremy for several years, but never had a combative experience with him.⁶ He testified Jeremy had “always been cooperative and polite” with him and that he had “never had a problem with him”. Based on their past acquaintance with the Henage brothers the officers initiated the optional “patrol procedure” not to find evidence of hidden weapons but because of their possible involvement with illicit drugs and, in fact, the first question Sgt. Baker asked of Jeremy was whether he had any contraband. No search had been conducted during the initial stop (when the potential of danger to the officers might have been the greatest), the Henages had been told they could go (the officers apparently having deemed them not to present a danger), and Sgt. Baker specifically told Jeremy he would not arrest him. While evidence that the friskee is under the influence of an illicit drug might serve as an ingredient in the totality of the circumstances inquiry, *see, e.g., State v. Johnson*, 137 Idaho 656, 661, 51 P.2d 1112, 1117 (Ct. App. 2002), Sgt. Baker did not learn that Jeremy had consumed the drug until after the search, and did not suspect that Jeremy was under the influence of an illegal drug. In short, Sgt. Baker did not connect Jeremy’s nervousness with anything tending to demonstrate present dangerousness.

Nor did Sgt. Baker articulate any furtive movements or behavior from which a person in Sgt. Baker’s position could reasonably conclude Jeremy was presently dangerous. Jeremy made no suspicious movements for his pockets or other area from which a weapon might be readily retrieved. *See and compare United States v. Davis*, 202

⁶ Sgt. Baker said he had been to situations where Jeremy had been in altercations but did not elaborate and did not say Jeremy had ever been involved in an altercation with a police officer.

F.3d 1060, 1063 (8th Cir. 2000) (officer encountering two individuals in known troubled area justified in frisking individual where, during frisk of defendant's cohort, defendant moved behind officer, adjusted his jacket, and inserted his hand into his jacket pocket); *see also United States v. Thomas*, 863 F.2d 622, 629 (9th Cir. 1988). Add this to the fact that Sergeant Baker actually *returned* the Leatherman to Jeremy, and we simply cannot say that the totality of the circumstances, *State v. Wright*, 134 Idaho 73, 76, 996 P.2d 292, 295 (2000), creates a reasonable inference that Jeremy was armed and dangerous.

The State argued that Jeremy's admission to carrying a knife was, by itself, sufficient to create in the officer a reasonable belief that Jeremy was armed and dangerous. Sergeant Baker testified that "[o]nce a person tells me they're in possession of a weapon, it compromises my safety." To be sure, Jeremy's admission established that he had a knife of some sort. And we are mindful of the substantial risk our peace officers face while in the field. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977). However, Sgt. Baker did not testify to any fact that demonstrated Jeremy presented a potential threat to him or others and, in fact, acknowledged that Jeremy was in no way threatening to him.

This Court defers to the factual findings of the district court unless those findings are clearly erroneous. Therefore, we must review the facts that the district court relied upon to reach its conclusion. The court first noted, when considering the issue of whether Jeremy was detained, that: "The defendant stated that he had a knife. As a result of this statement, and because of the defendant's continued nervousness, the officer felt that his safety had been compromised and he proceeded to search the defendant for weapons." While considering the propriety of the frisk, the court found: "Upon learning that the defendant had a knife on his person, and the continued nervous behavior exhibited by the defendant, the officer felt that his safety had been compromised and he proceeded to search the defendant for weapons." Thus, the court, after reviewing the evidence, found that Jeremy had told Sgt. Baker he had a knife, that Jeremy exhibited continued nervous behavior, and that Sgt. Baker felt his safety had been compromised, and determined that such facts justified the search. The first two findings have some support in the record and we will not second guess them. However, the finding that Sgt. Baker "felt" his safety had been compromised is flawed for two reasons – it is not supported by Sgt. Baker's testimony and it appears to be based on a subjective standard.

The only evidence upon which the court could have based Sgt. Baker's feeling that his safety had been compromised was Jeremy's nervousness and the officer's statement that "once a person tells me they're in possession of a weapon, it compromises my safety." However, this does not constitute the type of specific and articulable fact necessary to justify initiating a frisk under *Terry*. Sgt. Baker did not particularize this general statement to Jeremy, a person who had never given him any trouble, and he testified to an amiable, non-threatening encounter.

The district court based its determination that Sgt. Baker was justified in initiating the weapons frisk upon a subjective feeling attributed to Sgt. Baker rather than a determination as to "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." According to the district court: "Upon learning that the defendant had a knife on his person, and the continued nervous behavior exhibited by the defendant, the officer *felt* that his safety had been compromised and he proceeded to search the defendant for weapons." (Emphasis added.) Weapons frisks are not justified by an officer's subjective feeling, especially when that feeling is not particularized to a particular individual in a specific fact situation. Rather, the court must find that the officer has presented specific facts that can be objectively evaluated to support the conclusion that the subject of the intended frisk posed a potential threat. That is not the situation here.

IV.

The evidence obtained during the frisk should have been suppressed. The district court's order denying Jeremy's motion to suppress is reversed and Jeremy's conviction is vacated. The case is remanded for proceedings consistent with this opinion.

Chief Justice SCHROEDER and Justice KIDWELL CONCUR.

Justice EISMANN, dissenting.

Because the majority opinion is not consistent with decisions of the United States Supreme Court, I respectfully dissent.

In *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (citations omitted), the United States Supreme Court held:

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or “hunch,” but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

The above statement by the Supreme Court includes an ambiguity. The Court stated that a police officer could conduct a pat-down for weapons “where he has reason to believe that he is dealing with an armed and dangerous individual.” The issue is whether “armed” and “dangerous” are two separate requirements. Is it enough that the officer has reason to believe the person is armed, or must the officer also have additional reason to believe that the person is also dangerous?

The United States Supreme Court addressed that issue in *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977), when in a per curiam opinion it stated:

There remains the second question of the propriety of the search once the bulge in the jacket was observed. We have as little doubt on this point as on the first; the answer is controlled by *Terry v. Ohio*, *supra*. In that case we thought the officer justified in conducting a limited search for weapons once he had reasonably concluded that the person whom he had legitimately stopped might be armed and presently dangerous. Under the standard enunciated in that case - whether “the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate” - there is little question the officer was justified. The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of “reasonable caution” would likely have conducted the “pat down.”

In *Mimms*, the Court held that “armed and dangerous” did not constitute separate requirements for a pat-down for weapons. As the Court stated, “The bulge in the jacket permitted the officer to conclude that Mimms was armed *and thus posed a serious and*

present danger to the safety of the officer.” *Id.* (emphasis added). If the person is armed, he or she is sufficiently dangerous to justify a pat-down search.

In *Mimms*, the officers stopped the defendant’s car for having an expired license plate. At the request of one officer, the defendant stepped out of the car. Upon noticing a large bulge under the defendant’s sports jacket, the officer frisked him and discovered a revolver. There was no additional evidence that the defendant was dangerous. The officer only had reason to believe that the defendant had a weapon. The majority rejects *Mimms* and holds that being armed is not sufficient to justify a pat-down search for weapons. It requires that there must also be additional evidence that the suspect was dangerous. We lack the authority to overrule the United States Supreme Court on issues of federal law.

Justice BURDICK CONCURS.